GOH SWEE JOO & ORS. v. PUBLIC PROSECUTOR

[A. Cr. J. (Hashim J.) October 13, 1961]

[K.L. — Criminal Application No. 4 of 1961]

Criminal Procedure — Preliminary inquiry — Application to be held before another Magistrate — Criminal Procedure Code (Cap. 6), s.417(a), effect of finding of fact by Magistrate.

The duty of a Magistrate holding a preliminary inquiry is to find whether there is a case for committal to the High Court and it cannot be said in such a case that the liberty of the accused is in jeopardy as the Magistrate cannot convict the accused.

MOTION.

M. Shanker for the 1st applicant.

Dato S. M. Yong for the 2nd, 3rd and 4th applicants.

T. H. A. Potts for the Public Prosecutor on a *fiat*.

Cur. Adv. Vult.

Hashim J.: This is a motion for an order that the preliminary inquiry presently held by Enche Chan Siew Yoon, Magistrate, Kuala Lumpur, into alleged offences by the applicants under section 91 of the Income Tax Ordinance, 1947, and sections 107 and 109 of the Penal Code be transferred to another Magistrate for hearing on the ground that Che Chan Siew Yoon has reached certain findings of fact adverse to the applicants in his written judgment dated the 26th day of July, 1961.

Section 417 of the Criminal Procedure Code gives power to a Judge to transfer criminal cases. From the arguments of counsel for the applicants I presume section 417(a), Criminal Procedure Code, applies. Section 417(a) reads—

"(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate to him."

Counsel for applicants argued that, as Che Chan Siew Yoon had stated in his written judgment that all the applicants were partners of the same firm and the balance sheet and the profit and loss accounts which formed the subject matter of the charge bore the signatures of the first applicant, he had made a finding of fact prejudicial to the applicants resulting in a feeling of apprehension on the part of the applicants that they would not get a fair and impartial inquiry. Counsel quoted a number of cases in support of their argument. I am of the opinion that the cases so cited are not relevant to the issue in this motion.

The learned Magistrate was asked to give a ruling on a preliminary objection in that the sanction produced in Court was bad in law. The learned Magistrate in a nine-page written judgment (incidentally the judgment could have been much shorter) ruled the sanction was good in law. In the course of his judgment he made the remark about the applicants being directors of the firm. In my opinion the judgment should be read as a whole and if it is so read it is clear that the Magistrate has made no finding as to fact.

The duty of a Magistrate holding a preliminary inquiry is to find whether there is a case for committal to the High Court. It cannot be said that the liberty of the accused person is in jeopardy as the Magistrate cannot convict the accused person. Even if the accused person is committed to stand his trial in the High Court, the Public Prosecutor may not proceed with the charge at all — see section 381 of the Criminal Procedure Code. I therefore can see no reason whatsoever in this motion to direct that the preliminary inquiry be held before another Magistrate and the motion is dismissed.

Motion dismissed.

Solicitors: *Lovelace & Hastings; S. M. Yong & Co.*

PAHANG LIN SIONG MOTOR CO. LTD. & ANOR. v. CHEONG SWEE KHAI & ANOR.

[C.A. (Thomson C.J., Hill and Good JJ.A.) October 16, 1961]

[K.L. — F.M. Civil Appeal No. 13 of 1961]

Damages — Personal injuries — Loss of arm — Pain and suffering — Assessment of damages — Exercise of judicial discretion — Guidance from awards in previous cases — Taking account of local conditions — Paucity and diversity of local cases.

The plaintiff, while travelling in a bus owned by the 1st defendant and driven by the 2nd defendant, sustained serious crushing injury to his right arm, which had to be amputated. He was awarded $2,400 by the learned trial Judge as special damages, and $25,000 as general damages. On cross-appeal it was argued on behalf of the plaintiff that the award of $25,000 for general damages was so inordinately low as to justify the Court of Appeal in interfering and in particular that it was very much below the general run of damages given by the Courts in such cases.

Held: (1) whether or not the award made by the trial Judge was satisfactory, in all the circumstances of the case, it was not a wholly erroneous estimate of the damage suffered. *Dicta* of Birkett L.J. in *Bird* v. *Cocking & Sons Ltd.* (1), Singleton L.J. in *Rushton* v. *National Coal Board* (2), and Morris L.J. in *Scott* v. *Musical* (14) applied;

(2) in applying the above *dicta* two considerations must be borne in mind: (i) local social economic and industrial conditions are poles apart from conditions in England and Scotland and any tendency to take a particular line in relation to assessment of damages in cases of this type from a consideration of English and Scottish cases is not calculated to produce very useful results; (ii) local reported cases are so few in number and so diverse in their conclusions that they cannot afford any very reliable guidance.

Cases referred to:—

(1) *Bird* v. *Cocking & Sons Ltd.* [1951] 2 T.L.R. 1260.

(2) *Rushton* v. *National Coal Board* [1953] 1 Q.B. 495, 499.

(3) *Waldon* v. *The War Office* [1956] 1 All E.R. 108.

(4) *Katijah binti Abdullah* v. *Leo Leong Toh & Anor.* [1940] M.L.J. 87.

(5) *Vellama* v. *Eng & Co. & Anor.* [1940] M.L.J. 246.

(6) *Low Ah Tow* v. *Yusof bin Kayab* [1954] M.L.J. 112.
(7) *Loughran* v. *Armstrong* [1956] M.L.J. 137.
(8) *Drennan* v. *Greer* [1957] M.L.J. 77.
(9) *Aziz bin Shariff* v. *Easy Bus Co. & Ors.* [1958] M.L.J. 261.
(10) *Tan Kwee Low* v. *Lee Chong* [1960] M.L.J. 212.
(11) *Walter John Putra* v. *Sivagnanam & Anor.* F.M. Civil App. No. 15/58.
(12) *Flint* v. *Lovell* [1935] 1 K.B. 354, 360.
(13) *McCarthy* v. *Coldair Ltd.* [1951] 2 T.L.R. 1226, 1229.
(14) *Scott* v. *Musical* [1959] 2 Q.B. 429, 437.

COURT OF APPEAL.

M. Edgar for the appellants.

D. Murphy (*G. Tara Singh* with him) for the 1st respondent.

L. P. Thean for the 2nd respondent.

Cur. Adv. Vult.

Thomson C.J.: This is an appeal from a decision of Hepworth J. by one Loh Soo Chai who was the plaintiff in the original proceedings.

The plaintiff was a passenger in a bus owned by Pahang Lin Siong Motor Company Limited and driven by one Bishen Singh which on 18th February, 1959, was involved in a collision with a lorry driven by Cheong Swee Khai in the course of which the plaintiff sustained serious personal injuries.

He sued the owner and driver of the bus and the driver of the lorry and in the event obtained judgment for $27,400 against all the defendants.

The first two defendants appealed against that decision as a whole and the plaintiff cross-appealed against so much of it as awarded him $25,000 for general damages on the ground that that was inadequate.

In the event the defendants withdrew their appeals and so all we have to consider now is the plaintiff's cross-appeal which only concerns the quantum of damages.

The incident occurred on 18th February, 1959, and the plaintiff sustained serious crushing injury to his right arm, which must have caused him great pain and suffering. In consequence he was detained in hospital for three weeks and his right arm had to be amputated at a point so high that although he may be provided with an artificial limb for cosmetic purposes it will serve no useful purpose and for the rest of his life he will be in effect a one-armed man.

At the time of the accident the plaintiff was about 20 years old. He was a rubber tapper earning about $120 a month. He apparently had a smattering, but only a smattering, of education. After his discharge from hospital he was by reason of his disability unable to follow his former occupation as rubber tapper. He made attempts to obtain other employment in the small village in which he lives but at the date of the trial, which commenced on 17th February, 1961, these had so far been unsuccessful.

The trial Judge dealt with the question of damages as follows.

In the first place he awarded $2,400 as special damages being compensation for loss of earnings between the date of the accident and the date of the trial. It is not quite clear how he arrived at this result, but the result itself has not been complained of. Then he awarded $25,000 for general damages. He said that $3,000 of this was in respect of pain and suffering; that $13,500 was in respect of probable loss of future earnings and that $8,500 was in respect of disadvantages other than loss of earning capacity likely to arise in the future as a result of his disablement. He arrived at the figure of $13,500 for loss of future earnings by assuming the plaintiff has a natural expectation of life of 40 years. He then reduced this figure to 14 years to allow for the "accidents of life and other elements" and applied this figure to an assumed loss of earnings of $80 a month. On the basis of a rate of interest of 5%, this computation would, of course, produce a result of about $9,500 and not $13,500. The error in computation, however, was not commented on at the hearing and for myself I would make nothing of it beyond observing that $13,500 is about the figure that would have been arrived at had the expectation of life of 40 years been reduced to a notional figure of 24 years instead of 14 years.

I think the grounds of appeal which were urged on us by Mr. Murphy, with his usual persuasiveness, may be fairly summarised by saying that the award of $25,000 for general damages was so inordinately low as to justify this Court in interfering and in particular that it was very much below the general run of damages given by the Courts in such cases.

With regard to the second of these points, the law was thus stated by Birkett L.J. in the case of *Bird* v. *Cocking & Sons Ltd.* [1] in a passage which was quoted with agreement by Singleton L.J. in the later case of *Rushton* v. *National Coal Board* [2]:—

> "The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a Judge has to perform, and certainly the task is no lighter when the appellate Court is asked to reconsider the assessment made by a Judge in the Court below. The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard, the Courts have been making these assessments over many years, and I think that they do form some guide to the kind of figure which is appropriate to the facts of any particular case, it being for the Judge, or for the appellate Court if they are reviewing the matter, to consider the special facts in each case; for I agree with Mr. Veale that one case cannot really be compared with another. The only thing that can be done is to show how other cases may be a guide, and when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases?"

That passage, however, must be read in the light of the following passage from the judgment of Singleton L.J., in the later case of *Waldon* v.

The War Office [3]. There his Lordship referred to the question of considering similar cases and said (at p. 111):—

"I do not think that a Judge is bound to consider such cases. If counsel on one side or the other tenders such material, it is for the Judge to say whether, in his discretion, he thinks it will be of help to him or not. He may know all the recent cases on the subject, or most of them; he may not desire to complicate the issue, for it does mean some complication if that material is received. On the other hand, he may think that it would be of help to him. The danger of such material is that it is apt to take the mind of the tribunal from the particular facts of the case on which it is to give a decision."

Accepting these views two considerations must be borne in mind in their application in this country.

The first of these is that local social, economic and industrial conditions are poles apart from conditions in England and Scotland and any tendency to take a particular line in relation to assessment of damages in cases of this type from a consideration of English and Scottish cases is not calculated to produce very useful results. Times may be changing but this is still not an industrial country. The economy is still, generally speaking, a peasant economy in which the typical figures are the small cultivator and the small trader. This in its turn, although of course strictly speaking it does not affect the value of money, produces the consequence that small sums of capital are more difficult to acquire and more sought after than in England and, when acquired, are much more prized and are of much greater economic utility. In England the ordinary working man would not, generally speaking, be greatly attracted by the prospect of enough capital to acquire a small agricultural holding or open a small shop whereas in this country such an opportunity would generally be welcomed with avidity. For example, $25,000 in this country will purchase enough rubber land or padi land to enable a family to live in very great comfort with very little exertion. It is only in the most exceptional circumstances that a sum of £3,000 would produce such a result in England or Scotland.

Again, it must be remembered that, generally speaking, money wages are lower in this country than in England. For example, the plaintiff in *Rushton* v. *National Coal Board*, *supra*, was earning about £7. 5s. a week as a labourer, that is about $280 a month as against $120 a month earned by the present plaintiff. In that case the Court of Appeal reduced the damages from £10,000 to £7,000 which is just about double the damages awarded in the present case.

The second consideration to be borne in mind is that the local reported cases, most of which were cited to Hepworth J. are so few in number and so diverse in their conclusions that they cannot afford any very reliable guidance.

In the case of *Katijah binti Abdullah* v. *Leo Leong Toh & Anor.* [4] the plaintiff, who was a dancer, lost her right arm and in consequence her special aptitude for her work was destroyed. She was awarded $2,000, which is equivalent to about $6,000 to-day. In the case of *Vellama* v. *Eng & Co. & Anor.* [5] the plaintiff, who would appear to have been some sort of trader, also lost her right arm. In addition to a small sum of special damages she was awarded $750 general damages for loss of earning capacity and pain and suffering. This, again, was a pre-war case. In the case of *Low Ah Tow* v. *Yusof bin Kayab* [6] the plaintiff, who was a lorry driver, had suffered serious leg injuries which were likely to affect his earning capacity adversely. He was awarded $24,000 for pain and suffering, loss of future earnings and disadvantages arising from disablement. In the case of *Loughran* v. *Armstrong* [7] where there was a foot injury that did not involve substantial permanent disablement the Court of Appeal reduced an award of $7,500 for pain and suffering and inconvenience to $4,000. In the case of *Drennan* v. *Greer* [8] the plaintiff, who was an insurance agent, suffered injuries which involved shortening of one leg and restriction of the movement of the knee of that leg which it was found would limit his activities and lead to some loss of earning capacity. In addition to special damages he was awarded $35.000 for general damages. The Court of Appeal refused to interfere. In the case of *Aziz bin Shariff* v. *Easy Bus Co. & Ors.* [9] the plaintiff, who was a young man doing well in the Army, suffered loss of a kidney which rendered him unfit for Military service and a permanent shortening of the left leg. He was awarded $16.000 being $13,500 for pain and suffering and disadvantage and $2,500 for probable loss of earnings. In the case of *Tan Kwee Low* v. *Lee Chong* [10] the plaintiff, who was a rubber tapper, suffered shortening of a leg which it was said would reduce his earning power by 5%. He was awarded $3.000 general damages being $1,000 for pain and suffering and loss of amenities and $2,000 for future inconvenience. It is true that this judgment was reversed later by the Court of Appeal, but this was on the ground that there was no liability and the question of quantum was not considered. Finally, there is the case of *Walter John Putra* v. *S. Sivagnanam & Anor.* [11] which is unreported on the question of damages. That case was not cited to Hepworth J., but he must have had it in mind for he was a member of the Court of Appeal that in the event assessed the damages in it. The plaintiff was a business man whose recreation was motor racing and who suffered a permanent injury to the right arm. He was awarded $22,500 general damages for pain and suffering and future embarrassment and discomfort.

Although these local cases have not been discussed in detail I appreciate that on the facts each of them can be distinguished in some way or another from each of the others and from the present case. They are only mentioned here to show that they are so few and so diverse as to make it dangerous to form any views as to

what is "the general run of assessments" in this country.

With regard to the appellant's contention that the award in the present case is so low that it should be varied by this Court I am certainly not prepared to say in the words of Greer L.J. in the case of *Flint* v. *Lovell* [12]:—

"Either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it..... an entirely erroneous estimate of the damage to which the plaintiff is entitled."

Nor do I feel any disposition to say to myself: "Good gracious me — as low as that." (See *McCarthy* v. *Coldair, Ltd.* [13]).

For myself I see very little wrong with the award as a whole, though I do not altogether agree with the processes by which the trial Judge arrived at it. Indeed, in my view, if it errs at all it errs in the direction of being too generous. There is no doubt that for the rest of his life he is going to suffer inconvenience and embarrassment. There is no doubt that he will probably have to abandon his occupation as a rubber tapper and indeed, so far as it depends on his inherent physical and mental abilities, his earning capacity may well be considerably less in the future than it has been in the past. On the other hand, he is a young man and for a young man living in the social and economic circumstances in which he finds himself $25,000 will set him up very comfortably in life. He has been engaged in rubber cultivation and if he cares to invest even a portion of his damages in rubber land he can go on living the life to which he has been accustomed subject to the two exceptions that his income will be considerably higher than it has been in the past and that his labours will be considerably less arduous. What more the defendants can be required to do to make good the consequences of their wrong it is difficult to think.

All that, however, is beside the point. As was said by Morris L.J., in the case of *Scott* v. *Musical* [14]:—

"It is recognised that the fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. There is, to some extent, an exercise of judicial discretion. It is for this reason that, if three Judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial Judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the Judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered."

Whether or not I am right in thinking that the award made by Hepworth J. is on the whole a satisfactory one having regard to all the circumstances of the case, I am certainly satisfied that I am right in saying that it is not "a wholly erroneous estimate of the damage suffered."

I would dismiss the appeal with costs.

Hill J.A.: I have had the advantage of reading the judgment of the learned Chief Justice, with which I agree and have nothing to add.

Good J.A.: I have had the advantage of reading the judgment of the learned Chief Justice with which I am in complete agreement. I really have nothing to add to it, but I feel impelled to record my express agreement with what he has said on the subject of referring to the damages awarded in English and Scottish cases in relation to the assessment of damages in this country. The practice of holding a sort of auction based on the sums which have been awarded in England and Scotland is not necessarily conducive to arriving at the right result, or even a fair result, in local conditions here.

I too would dismiss this cross-appeal with costs.

Appeal dismissed.

Solicitors: *Bannon & Bailey; Murphy & Dunbar; Shook Lin & Bok.*

CHEE KIM SENG & ANOR. v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Good JJ.A.) October 16, 1961]

[K.L. — F.M. Criminal Appeal No. 18 of 1961]

Criminal Law and Procedure — Murder — Penal Code, s.300 — Defence of accident — Direction to jury — Possibility of culpable homicide not amounting to murder not put to jury.

The appellants were charged with murder of a fishmonger on a street in broad daylight and the first appellant was convicted of this offence and sentenced to death. The second appellant was convicted of culpable homicide not amounting to murder and sentenced to six years' imprisonment. The first appellant had pleaded accident in his defence and that was the only defence put forward. In his summing-up to the jury, the learned trial Judge put the matter as a case of murder or of no offence at all.

Held: the learned trial Judge erred in putting the matter to the jury in this form. The evidence could be viewed as giving rise to an offence less than murder though still culpable, and even though the defence did not rely on any other ground than the one of accident, possible defences which would have reduced the offence from one of murder to one of culpable homicide not amounting to murder should have been put to the jury.

Cases referred to:—

(1) *Lumley* 22 Cox C.C. 635.
(2) *Director of Public Prosecutions* v. *Smith* [1960] 3 All E.R. 161.
(3) *R.* v. *Hopper* [1915] 2 K.B. 431, 435.
(4) *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1.
(5) *Kwaku Mensah* v. *The King* [1946] A.C. 83, 93.

COURT OF APPEAL.

L. P. Thean for the 1st appellant.

M. W. Maxwell for the 2nd appellant.

Syed Othman bin Ali (Deputy Public Prosecutor) for the respondent.

Thomson C.J.: These two appellants were charged at the Muar Assizes with the murder of